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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1997

**CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM and FLORIDA STATE BOARD OF ADMINISTRATION,**

*Petitioners,*

v.

**PAUL FELZEN, et al.,**

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF OF DIRECTORS OF ARCHER DANIELS MIDLAND COMPANY IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether a court of appeals, in a derivative action brought on behalf of a corporation, had jurisdiction to hear the appeal of nonparty shareholders from the district court's order approving settlement of the action.

2. Whether a court of appeals, when ruling that it does not have jurisdiction in a case, properly declined to make its decision prospective only.

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## STATEMENT OF THE CASE

Petitioners are two nonparty shareholders of Archer Daniels Midland Company ("ADM") who filed objections to a proposed settlement of this derivative action but failed to file a motion to intervene and, as a consequence, had no right to appeal from the district court order approving the settlement. Respondents filing this brief were members of the Board of Directors of ADM in 1995 who were named as defendants in the derivative suits filed in Illinois and Delaware.[1] These suits were settled in a consolidated process before the Honorable Harold A. Baker, United States District Judge for the Central District of Illinois, on July 7, 1997, when plaintiffs in all pending derivative actions appeared before Judge Baker and agreed to be bound by any settlement which the court approved. Petitioners, who hold less than one percent of the stock of ADM, objected to the proposed settlement below, which was predicated upon substantial changes to the way in which ADM governs itself and the creation of an Audit Committee of independent directors to monitor the company's compliance. Petitioners chose not to intervene below but, when the

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[1] Respondents (hereinafter referred to as the "Directors") are Dwayne O. Andreas, Lowell W. Andreas, Martin Andreas, Michael D. Andreas, Shreve M. Archer, Jr., Ralph Bruce, Howard G. Buffett, John H. Daniels, Ray A. Goldberg, H.D. Hale, F. Ross Johnson, M. Brian Mulroney, James R. Randall, Margaretta Rockefeller, Robert S. Strauss, John K. Vanier, and O. Glenn Webb. Gaylord O. Coan joined the Board of Directors after the events complained of in the action and was erroneously added to some of the suits filed in Delaware. Of the eighteen Directors named, eight are currently members of the Board.

district court overruled their objections and approved a settlement, Petitioners sought to appeal.

Plaintiffs below moved to dismiss Petitioners' appeal. The Court of Appeals for the Seventh Circuit (the "Seventh Circuit") dismissed Petitioners' appeal for the very basic reason that they were not parties to the case, and thus the Court had no jurisdiction over their appeal from approval of the settlement. In reaching this determination, the Seventh Circuit relied on law well settled not only in this Court but among the circuits. The Seventh Circuit also persuasively articulated the reasons that a shareholder is especially unqualified to appeal as a nonparty:

> . . . in a shareholders' derivative action, the individual investor is not an injured party and is not entitled to litigate. A derivative suit is brought by an investor in the corporation's (not the investor's) right to recover for injury to the corporation . . . . So it cannot be surprising that stockholders other than named plaintiffs are not treated as parties in derivative litigation—their citizenship is ignored when determining diversity . . . and they are not allowed to opt out . . . . Shareholders have no more the attributes of parties when managers settle derivative litigation than when managers settle antitrust litigation.

(Petition at 5a)

Now, having forfeited any right to appeal by failing to intervene as parties—all in defiance of ample precedent pointing the way—Petitioners seek a grant of *certiorari*. Meanwhile, ADM's directors have appointed an independent Audit Committee, consisting of directors who joined the board after the events of which plaintiffs



below complained and await resolution of Petitioners' efforts to undo the settlement before the Audit Committee takes steps to implement the settlement terms. For the reasons that follow, the Petition should be denied.

## REASONS FOR DENYING THE PETITION

The Petition here stands as a model for advocacy by deception and diversion. Among other things, the Petition:

(1) unfairly conjures up from two circuit court cases, each distinguishable from the instant case, an "irreconcilable split" among the circuits;

(2) interposes a long statement of background facts and fervent complaints about the fairness of a court-approved shareholders' derivative suit, neither of which has any bearing upon the narrow and strictly legal issues involved here;

(3) confuses the essentially different natures of a class action under Rule 23 of the Federal Rules of Civil Procedure, where corporate shareholders allege injury to themselves, from a derivative suit under Rule 23.1 of the Federal Rules of Civil Procedure, where the corporation itself holds the legal claim and may receive damages;

(4) belittles this Court's holding in *Marino v. Ortiz*, 484 U.S. 301 (1988), almost to the point of denying its existence;

(5) misrepresents the state of the case law in the Seventh Circuit at the time Petitioners made their decision to forego intervention in the action below and thereby

assumed the obvious risk that they would not have a right to appeal;

(6) cites voluminous authority for sweeping statements concerning the importance of participation by nonparty shareholders in the judicial settlement process without ever acknowledging that the cited authority generally references proceedings only at the district court level; and

(7) offers numerous examples of appeals by nonparty "privies" that are "routinely permitted," even though each example involves a party over whom a court had already exercised jurisdiction.

## I. PETITIONERS' BACKGROUND STATEMENT OF FACTS IS NOT RELEVANT TO THE LEGAL ISSUES INVOLVED HERE

The first indicator of the Petition's weakness is its highly charged statement of background facts, none of which is necessary for this Court's consideration of the well-defined legal issues involved here. Petitioners lay out the origins of the derivative suit in terms of FBI "raids," a criminal "probe," conspiracy with "foreign companies," "national media attention," "corporate cronyism," and "waves of negative publicity." (Petition at 4-5) Turning to the derivative suit itself, Petitioners complain that plaintiffs' counsel "did almost nothing to prosecute the case" and focused "what little energy they expended on settlement." (Petition at 6) The settlement, according to Petitioners, did not return "one dime" and "provided no material benefit to shareholders," allocating a payment "*exclusively* to pay for attorneys' fees." (Petition at 6-7; emphasis in original) This narrative, even if not discounted for distortions of rhetoric, has



nothing to do with the right of nonparty shareholders to appeal from a settlement of a derivative suit.

Petitioners' background statement is, however, instructive on two counts. First, it shows that ADM's nonparty shareholders were in fact accorded the participation in the judicial settlement review process that Petitioners regard as "a key procedural countermeasure" against derivative settlements too heavily weighted with attorneys' fees. (Petition at 14) The district court followed standard procedure in tentatively approving a settlement and inviting shareholders—whether parties or not—to show why the proposed settlement should not be finally approved. (Petition at 7) In response, the Petitioners filed written objections to the proposed corporate governance changes and appeared at a hearing where they asked the district court to reject or revise the settlement. (*Id.*)

Second, Petitioners' background statement reveals their underlying motivation for challenging the settlement and, ultimately, in making the Petition: they are members of the Council of Institutional Investors, "an association of more than one hundred corporate, public, and union pension funds . . . ." (Petition at 5) The "standards for corporate independence" which Petitioners sought to include in the settlement agreement were based on standards developed by the Council of Institutional Investors which, according to an unsupported assertion in the Petition, have been "adopted by most or many of the nation's largest companies." (Petition at 5) Petitioners objected that the governance standards in the proposed settlement, which the district court found consistent with established concepts of corporate governance, did not parrot the definitions which Petitioners

had recently published. Hence, Petitioners' participation in the proceedings derives at least in part from their interest in seeking judicial leverage to impose the pension funds' governance standards on a large company. (Petition at 7)

## II. PETITIONERS HAVE NOT IDENTIFIED A CONFLICT IN THE CIRCUITS CONCERNING THE RIGHT OF NONPARTY SHAREHOLDERS TO APPEAL FROM SETTLEMENT OF A DERIVATIVE SUIT

### *A. This Court's Holding in Marino v. Ortiz Is Determinative*

Petitioners' treatment of *Marino v. Ortiz*, *supra*, is the centerpiece of their efforts to fabricate a conflict in the circuits on the issue of nonparty shareholder standing. *Marino* stands as an unyielding barrier to *certiorari*, and Petitioners seem to recognize it as such, because they do little more than call it names. A portion of *Marino* which the Seventh Circuit quoted, for example, is dubbed "a gloss of inessential language," and "a single aside." (Petition at 9) Later, the same language becomes "a lone paragraph," (Petition at 12) and then "unnecessary." (Petition at 19)

What Petitioners seek to obscure is the very real force of *Marino*. There, this Court first stated:

> [W]e hold that because petitioners were not parties to the underlying lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal from the consent decree approving that lawsuit's settlement;

484 U.S. at 304. In the next sentence of the opinion, this Court emphasized the lack of controversy over this principle:



> The rule that only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment, is well settled.

*Id.* The Court then addressed the view of the court of appeals and politely rejected it:

> The Court of Appeals suggested that there may be exceptions to this general rule, primarily "when the nonparty has an interest that is affected by the trial court's judgment." 806 F.2d at 1152. We think the better practice is for such a nonparty to seek intervention for purposes of appeal; denials of such motions are, of course, appealable.

*Id.*

It is the last quoted sentence that Petitioners identify as the basis for the Seventh Circuit's ruling here because, when read in isolation, the words may suggest that an appellate court can exercise discretion in permitting a nonparty's appeal. The preceding sentences, however, show that this Court made no such suggestion. After holding without reservation that nonparties may not appeal from approval of a settlement, this Court underscored the point by noting that the rule is well settled. Then, turning to the court of appeals' conflicting view, this Court rejected it by endorsing intervention as the "better practice." This Court did not say intervention was the "better practice" only under the facts presented in *Marino* or in any other particular kind of case. The words were simply a reiteration of what this Court had just held:

> because petitioners were not parties to the underlying lawsuit . . . they may not appeal

> from the consent decree approving the lawsuit's settlement.

484 U.S. at 304.

In view of *Marino's* mandate alone, the prudent course for Petitioners would have been to intervene in the district court before final approval of the settlement. They gambled on whether the Seventh Circuit would follow *Marino* and, not unpredictably, they lost. They should now have no recourse in a writ of *certiorari*.

### *B. The Seventh Circuit's Ruling Does Not Raise a Conflict Among the Circuits*

Petitioners characterize the circuits as "irreconcilably split over whether nonparty shareholders must intervene as parties in order to appeal adverse judgments." (Petition at 11) According to Petitioners, "[t]he Third, Tenth, and (until now) Seventh Circuits have all approved nonparty shareholder appeals." (Petition at 12) These statements are wrong, first, in exaggerating whatever inconsistency exists among the circuits and second, in suggesting that the Seventh Circuit abruptly and independently changed its view on the issue. In fact, only one decision from the Third Circuit, which failed to follow this Court's holding in *Marino* and is in any event distinguishable, differs from the result in the Seventh Circuit. Moreover, the Seventh Circuit very predictably followed *Marino* and even heralded the outcome below by following *Marino* in another case, decided prior to the district court's approval of the settlement here, where the court dismissed appeals of nonparty class members. *See In Re Brand Name Prescription Drugs Antitrust Litigation*, 115 F.3d 456 (7th Cir. 1997).



#### *1. The Purported Split of Authority*

The sole case forming the basis for Petitioners' claim of an "irreconcilable split" in the circuits is *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993). Petitioners, however, boldly misrepresent to this Court that another case, *Gottlieb v. Wiles*, 11 F.3d 1004 (10th Cir. 1993), is also in conflict with the Seventh Circuit. (Petition at 2, 8, 12) *Gottlieb* involved settlement of a class action under Rule 23, which, as both the *Gottlieb* court and the Seventh Circuit here noted, is quite different from settlement of a derivative action. 11 F.3d at 1010-11; Petition at 4a-5a. More important, while Petitioners may attempt to rely upon *Gottlieb's dicta* concerning derivative suits, the Tenth Circuit's holding is "that standing is dependent upon a grant of intervention . . . ." 11 F.3d at 1006. *Gottlieb* is thus not only off point but also contrary to the outcome which Petitioners advocate. Petitioners also seem to infer a conflict from *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1985), but that case involved an appeal from an award of attorneys' fees, not approval of a settlement. No Tenth Circuit case, then, is at odds with the Seventh Circuit here. This leaves only *Bell Atlantic*.

The court in *Bell Atlantic* was faced with nonparty appeals from approval of a derivative suit settlement, but the result it reached was based on Rule 23 class action precedent and analysis. In fact, as the court began that analysis, it noted that "we need not decide whether different rules apply to objector appellate standing in class and derivative suits." 2 F.3d at 1307, n.4. After reviewing the cases in other circuits concerning class action settlements, the court turned to its own decision in *Ace Heating & Plumbing Co. v. Crane Co.*,

453 F.2d 30 (3d Cir. 1971)—also a class action case. *Ace*, which involved settlement of nationwide antitrust litigation, raised issues concerning the effect of class members' failure to opt out of the settlement upon their right to appeal. The *Bell Atlantic* court, after considering the "broad view of objector standing embodied in *Ace*," concluded that the shareholders "had standing to appeal" the order approving settlement. 2 F.3d at 1310.

The *Bell Atlantic* court did raise policy considerations—shareholders' difficulty in monitoring and controlling their attorney, collective action of plaintiffs' attorneys and defendants, and "informational constraints" when the attorneys for both sides present a settlement to the court for approval—but none of these considerations is peculiar to derivative actions. *See* 2 F.3d at 1309-10. The Third Circuit did not address the factors which the Seventh Circuit considered determinative in a strict derivative suit context, *i.e.*, the derivative claim belongs to the corporation not the shareholders, the shareholders are not the injured parties, and as a consequence, their citizenship is ignored when determining diversity, and they are not allowed to opt out. (Petition at 4a-5a)

*Bell Atlantic*, then, stands not so much as a counterpoint to the Seventh Circuit's rule disallowing nonparty appeals in derivative suits as another opinion treating the issue of such appeals in a broader context including class actions. Moreover, the *Bell Atlantic* court did not take a position directly opposing the Seventh Circuit on the impact of *Marino*. Where the Seventh Circuit found *Marino* controlling, the Third Circuit merely quoted it for the general rule that only parties may appeal an adverse judgment, 2 F.3d at 1307, before moving on to its



own analysis of the issue. *Bell Atlantic* thus never came to grips with *Marino*; the opinion does not reject an argument that *Marino* is controlling, nor does it hold that an exception to the *Marino* rule exists for nonsettling parties in derivative actions. Any court in the future considering those issues thus should have no difficulty in reconciling *Bell Atlantic* with the Seventh Circuit's rule. *Bell Atlantic* is readily viewed as essentially a class action opinion that in any event did not directly address *Marino*, whereas the Seventh Circuit's opinion strictly focused upon a derivative action scenario and firmly held that *Marino* controls.

### *2. The State of the Law in the Seventh Circuit*

Petitioners attempt to bolster a weak *Bell Atlantic* argument and enhance the appearance of a split in the circuits by noting that the Seventh Circuit had formerly approved nonparty appeals, apparently suggesting that a split exists because the Seventh Circuit is in conflict with itself. (Petition at 12) Apart from making no sense in terms of assessing whether a split in the circuits exists, Petitioners' suggestion distorts what the Seventh Circuit actually accomplished in this case. Faced with the issue of nonparty shareholder appeals, the court first found *Marino* controlling and then of necessity overruled a case predating *Marino*, *Tryforos v. Icarian Development Co.*, 518 F.2d 1258 (7th Cir. 1975), which had stated that the right of nonparty shareholders to appeal was "clear." The court also formally overruled *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970), "and any other case in this circuit . . . that permits nonparties to appeal from a decision of any kind

in a class action." (Petition at 4a) Thus, the Seventh Circuit did not raise a conflict with an earlier opinion; it quite logically ruled so as to avoid one.

The Seventh Circuit's ruling in this case should have come as no surprise inasmuch as it is consistent with the court's opinion last year in *In Re Brand Name Prescription Drugs Antitrust Litigation, supra*. There the panel, following *Marino*, held that a nonparty in a class action could not appeal from an order granting summary judgment to the defendant. The *Brand Name* ruling came six weeks prior to the district court's fairness hearing in this case, which makes Petitioners' failure to intervene all the more daring. In any event, none of Petitioners' discourse on the Seventh Circuit's own decisions on jurisdiction over nonparties can transform those decisions into a conflict among the circuits.

### *3. Conclusion*

The hollowness of Petitioners' split-in-the-circuits argument may be discerned in just one paragraph of the Petition:

> Nor can the split of authority be reconciled. The Third, Tenth, and (until now) Seventh Circuits have all approved nonparty shareholder appeals. *See, e.g., Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304; *Gottlieb v. Wiles*, 11 F.3d 1004; *Rosenbaum v. MacAllister*, 64 F.3d 1439 (10th Cir. 1985); *Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258. The Seventh Circuit now demands formal intervention, in express "disagree[ment]" with these courts. Pet. App. 7a. [footnote]

(Petition at 12) Petitioners appear to set up a conflict involving three circuits and four separate opinions. The



cases, however, are: *Bell Atlantic*, discussed at length above; *Gottlieb*, the class action case which does not follow *Bell Atlantic* and in fact rejects the notion of nonparty appeals; *Rosenbaum*, which is distinguishable on its facts; and, finally, *Tryforos*, the case overruled by the Seventh Circuit because it predated *Marino*. In short, the case for a split of authority boils down to *Bell Atlantic* alone. The last sentence of the quoted paragraph misrepresents what the Seventh Circuit itself said about a conflict, as Petitioners pluck the word "disagree" from a sentence where the court said only that it disagreed with the conclusion in *Bell Atlantic* and transform it into the Seventh Circuit's "disagreement" with the plural, "these courts." The footnote to the paragraph contains only a lengthy citation to what are admittedly Rule 23 class action cases. Such artifice cannot support a grant of *certiorari*.

## *C. The Seventh Circuit's Decision Requiring Intervention Is Consistent with Rule 23.1 and with Traditional Common Law and Federal Practice*

Petitioners warn that their imaginary split in the circuits has "tremendous practical consequences for all nonparty shareholders and the integrity of the shareholder derivative suit process." (Petition at 13) Petitioners argue (1) that requiring intervention is contrary to an overall policy favoring participation by nonparty shareholders in the judicial settlement process (Petition at 14); and (2) that the "Seventh Circuit's shareholder intervention mandate is wrong as a matter of law," being contrary to both Rule 23.1 and common law. (Petition at 17-18) Neither of these arguments is persuasive.

### *1. Participation By Nonparty Shareholders*

Petitioners fill a large segment of their Petition with lengthy citations to authority for the proposition that participation of nonparty shareholders in the judicial settlement process is "a key procedural countermeasure for exposing and preventing . . . corruption." (Petition at 14-15) ADM's Directors do not dispute that general proposition, as far as it goes. The problem with Petitioners' argument, however, is that the general principle does not, under *Marino*, extend to an appeal by nonparty shareholders who have not intervened as parties. The authority Petitioners cite merely endorses the system mandated by Rule 23.1 where nonparty shareholders are given notice and an opportunity to be heard prior to the district court's ruling on a proposed settlement. If a nonparty shareholder seeks involvement beyond that stage, intervention is the obvious next step.

Petitioners complain, however, that intervention imposes a hugely increased financial burden on a shareholder. (Petition at 15-16) To whatever extent such a burden actually exists, Petitioners again miss the point. Intervention is necessary because *Marino* directs that a court of appeals cannot have jurisdiction over a nonparty's appeal from a district court's order approving settlement. Petitioners' argument, then, boils down to the illusory conflict among the circuits in which Petitioners posit that shareholders are faced with a dilemma over intervention. No such dilemma exists; intervention is required.[2]

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[2] Petitioners cite to three circuit court cases which supposedly stand for the "settled law in the Seventh Circuit and elsewhere [which] strongly disfavors intervention after a tentative settlement is reached." (Petition at 16 n.18, *citing Farmland Dairies v. Comm'r of New York State Dep't of Agric. & Markets*, 847 F.2d 1038, 1043-44 (2d Cir. 1988); *Jones v. Caddo Parish Sch. Bd.*, 735 F.2d 923 (5th Cir. 1984); *Ragsdale v. Turnock*, 941 F.2d 501, 504 (7th Cir. 1991). None of these cases, however, involved a derivative suit or class action settlement, and, more important, none contains any general statement that intervention is disfavored after a settlement is reached. Each case simply considers the attempted intervention before it and applies the standards of Rule 24, which require that intervention be timely. In any event, *Marino* makes intervention the only course for nonparty shareholders who wish to preserve their right to appeal. So long as that course is followed in a timely way, courts may permit a nonparty to intervene, and of course denial of intervention is subject to appeal.

(continued...)



### *2. Rule 23.1 and Common Law*

Petitioners argue that the Seventh Circuit's "newly fashioned rule" is inconsistent with the purposes of Rule 23.1 and "in tension with common law practice." (Petition at 17-18) On the first point, Petitioners merely reiterate that the rule does not encourage fair settlement. On the second point, Petitioners cite to a treatise by "English legal scholar Frederic Calvert" published in 1846 and another treatise by Joseph Story published in 1840. As the Seventh Circuit observed concerning similar efforts by Petitioners, they "boil down to a claim that erroneous decisions should be reversed, but arguments of this stripe do not justify omitting the step of intervening as a party." (Petition at 3a) The Seventh Circuit understood that, in a derivative action, "the individual investor is not an injured party and is not entitled to litigate." (Petition at 5a) Rather, suit is brought

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[2] (...continued)

"in the corporation's (not the investor's) right to recover for injury to the corporation." (*Id.*) Analogizing to a *qui tam* action, the court noted that the investors "just get the ball rolling" and that shareholders "have no more the attributes of parties . . . than when managers settle . . . litigation." (*Id.*) Thus, courts focus on the fairness of the derivative settlement to the corporation. Petitioners' personal effort to challenge that fairness on appeal—when no appeal was taken by the defendants, the corporation, or the plaintiffs representing the interests of the overwhelming majority of shareholders who did not object (all of whom were parties to the actions)—is simply misplaced.

Petitioners make one final assault on *Marino*, suggesting that the Seventh Circuit should have placed more weight on nineteenth century commentary than upon this Court's ruling. (Petition at 18) Petitioners first argue that the language of *Marino* relied upon by the Seventh Circuit ("the better practice is to seek intervention") is "unnecessary" to the holding. As explained in section II.A of this brief, however, it is the *holding* of *Marino*, not the "better practice" language, which dooms Petitioners here. It was the *holding* in *Marino* upon which the Seventh Circuit expressly relied. (Petition at 2a) The "better practice" language was simply a reiteration of the holding.

Petitioners attempt to distinguish *Marino* on its facts, arguing that the nonparties there were not members of "the class whose rights are directly affected by any judgment entered in the case . . . ." (Petition at 19) Again, Petitioners have scrambled Rule 23 analysis and a Rule 23.1 case: shareholders in a derivative suit are *not* direct parties in interest. In any event, the holding of



*Marino* cuts across both kinds of cases. A court of appeals has no jurisdiction over *any* appeal by a nonparty from approval of a settlement.

Petitioners point to *United States ex rel. Louisiana v. Jack*, 244 U.S. 397 (1917), the "lone case" cited in *Marino*, as establishing that "part[ies] *and priv[ies] to the record*" may appeal an adverse decision. (Petition at 19; emphasis by Petitioners) According to Petitioners, "nonparty shareholders are at least 'privy to the record' in derivative suits," although they cite no authority for that proposition, nor offer any definition of the term. (Petition at 20) Petitioners contend that "much settled law would have to be over-turned" if only parties to lawsuits may appeal, and proceed to cite numerous examples where "[n]onparties affected by trial court judgments are treated by the federal courts as 'de facto' parties and permitted to appeal without intervention . . . ." (*Id.*) The trouble with Petitioners' examples is that each involves a court order formally addressed to a nonparty, thus providing appellate jurisdiction.

In one of Petitioners' examples, where a court held a nonparty witness in contempt, the court exercised its contempt jurisdiction over the witness. (Petition at 21 n.22) In another set of examples, Petitioners rely on decisions in which courts that denied an award of attorneys' fees had exercised jurisdiction over the attorneys. (Petition at 21 n.23) And finally, Petitioners point to decisions where a court heard a nonparty who was obligated to the defendant for amounts paid under the court's judgment, after the court had gained jurisdiction by reason of the judgment. (Petition at 21 n.24) None of these examples is affected by the *Marino* rule; each

affected "nonparty" had a separate avenue of appeal to protect his personal interests.

The whole point of *Marino* and the Seventh Circuit here is that an appellate court must have jurisdiction over a person in some individual capacity before that person can participate in appellate proceedings; whether that jurisdiction arises from the court's initiative or action by a potential party is irrelevant. Even Petitioners, as preface to a string citation of cases purporting to support their position, state that "federal courts routinely permit nonparty appeals from judgments that bind the nonparty *by name*." (Petition at 20; emphasis added) Petitioners thus acknowledge that the court involved must take some action relating to a particular individual for appellate jurisdiction to arise.

Petitioners next criticize the Seventh Circuit's reliance on Federal Rule of Appellate Procedure 3(c), which provides that a "notice of appeal must specify the *party or parties* taking the appeal . . . ." (Petition at 2a; emphasis the court's) It was *Marino*, however, not the rule, that formed the basis for the court's ruling. The rule merely reflects the settled principle stated in *Marino*. Petitioners are correct in saying that Rule 3(c) "hardly purports to delineate what matters are inherently eligible or ineligible for appeal" (Petition at 22), but that delineation, contained in *Marino* and elsewhere, draws one bright line: only parties may appeal from approval of a settlement.

Petitioners also seek to use Rule 3(c) affirmatively, first by arguing from provisions concerning class actions, which have no application here and then, incredibly, by redrafting the rule:



> . . . a nonparty shareholder *can* strictly comply with the Rule's language simply by "specify[ing]" that no party is taking the appeal, and "naming each [nonparty] appellant in either the caption or the body of the notice of appeal."

(Petition at 23) Aside from its boldness in adding new terms to the rule, this statement belies Petitioners' statement, made only a page earlier, that "Rule 3(c) hardly purports to delineate what matters are inherently eligible or ineligible for appeal." (Petition at 22) Whether viewing the rule as it is written or as edited by Petitioners, this Court's soundly reasoned opinion in *Marino* takes precedence.

## III. THE SEVENTH CIRCUIT'S DECISION TO APPLY ITS RULING RETROACTIVELY IS DICTATED BY PRECEDENT OF THIS COURT, RAISES NO CONFLICT IN THE CIRCUITS, AND CAUSES NO UNFORESEEABLE HARM TO PETITIONERS

Petitioners argue that the Seventh Circuit's "newly formulated" prohibition of nonparty appeals should be applied only prospectively because Petitioners relied on "settled" Seventh Circuit appellate procedures at the time they appealed. (Petition at 23-24) This approach ignores the controlling precedent of this Court and what should have been the obvious import of *Marino* and *In Re Brand Name Prescription Drugs*.

In beginning their argument, Petitioners attempt to color the situation with a quote from Justice O'Connor's dissent in *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 113 (1993): "[t]his Court's retroactivity jurisprudence has become somewhat chaotic in recent years." (Petition at 23) *Harper*, however, was a case involving the ret-

roactivity of a Virginia statute taxing federal retirees. There was no jurisdictional issue, and this Court cited no cases dealing with the retroactive application of a decision that an order is not appealable. This Court's jurisprudence on retroactivity in those kind of cases is a model of clarity which even Petitioners do not challenge directly.

The Seventh Circuit followed those clear rules in relying principally on *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981), where this Court held that a "court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." (Petition at 7a) In the face of *Firestone*, Petitioners again contrive a momentous split in the circuits, yet once again the "split" shrinks to insignificance upon scrutiny. One case supposedly "in conflict with the decision here" is *Pettyjohn v. Shalala*, 23 F.3d 1572 (10th Cir. 1994), which, according to Petitioners, held "that nothing in *Firestone* requires retroactivity in jurisdictional disputes where appellants would be barred from ever raising their issues before a court of appeals." (Petition at 25) That characterization is pure fiction. First, *Pettyjohn* was not even a case involving a jurisdictional dispute; at issue was the timeliness of an attorney's application for fees under the Equal Access to Justice Act. The decision turned on characterization of a remand from the district court to the administrative agency hearing the plaintiff's application for social security disability benefits. The Tenth Circuit's opinion *does not even mention Firestone*. *Firestone* is cited only in the dissent by a district judge sitting by designation and then only to say that "new rules—especially jurisdictional rules—are to be applied retroactively." 23 F.3d at 1575. That sentiment, of course, was shared by the Seventh Circuit here.



The only other case purported to raise a conflict in the circuits is *George v. Camacho*, 119 F.3d 1393 (9th Cir. 1997), where the court overruled an earlier case holding that plaintiffs in the Northern Mariana Islands are afforded a seven-day extension for filing notices of appeal, and gave only prospective effect to a new rule that notices must be filed within the time allotted by the Federal Rules of Appellate Procedure. The Ninth Circuit distinguished *Firestone* as concerning "a different kind of jurisdictional issue than is present in the case before us." 119 F.3d at 1397. The court believed that *Firestone* was based on the lack of finality of the order appealed from and thus there was "no question in *Firestone* of forfeiting anyone's right to appeal permanently." *Id.* The Ninth Circuit simply refused to hold "that appeals that were timely filed under the law in effect at the time of the filing may retroactively be deemed untimely." 119 F.3d at 1404. Not surprisingly, five of the eleven members of the court sitting *en banc* dissented, adhering to *Firestone's* binding mandate.

*George* is incorrectly decided, but its peculiarity should not deter other courts from following so coherent a precedent as *Firestone*, particularly in view of its similarly forceful progeny, *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196 (1988) and *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). In any event, a court faced with a nonparty shareholder seeking to appeal in the context of a derivative action should have no difficulty distinguishing *George* as a case strictly limited

to a change in the time allowed for filing an appeal from a distant territory. There is, after all, not even the appearance of a conflict among the circuits on the Rule 23.1 issue addressed by the Seventh Circuit here.

Petitioners offer up various nightmare scenarios that they say will result from the rule that findings of no jurisdiction apply retroactively: systematic denial of review, litigants relying on settled law only to be barred from appeal when that law is overturned in their own cases, and "a bizarre incentive for litigants to file every conceivable paper and motion . . . solely as an insurance policy against a possible change in law." (Petition at 25-26) What Petitioners would have this Court lose sight of, however, is that a single piece of paper would have provided them with that very insurance policy—a petition to intervene. Amid all of their rhetoric about promoting reliance on settled law, Petitioners never face up to *Marino* and *In Re Brand Name Prescription Drugs*, the settled law that existed when they decided not to become parties to this litigation.

In another attempt to evade *Firestone*, Petitioners challenge the Seventh Circuit's "premise" that "[A] court may not in any case, even in the interest of justice, extend its jurisdiction where none exists." (Petition at 10a, 27) According to Petitioners, a court of appeals has "adjudicatory power," deriving from Article III of the Constitution and 28 U.S.C. § 1291, which extends to any person who has the unusual status of "prudential" standing. (Petition at 27-28) In support of this theory, Petitioners cite this Court's decisions in *Bennett v. Spear*, 520 U.S. 154 (1997), and *Allen v. Wright*, 468 U.S. 737 (1984). *Bennett* held that plaintiffs had standing under the "zone of interests" test to bring a citizen suit under the Endangered Species Act. In *Allen v. Wright*, this Court ruled that parents of African-American school children did not have standing to bring a class action against the Internal Revenue Service for failing to deny tax-exempt status to racially discriminatory private schools. In each case, the issue was one of standing, *i.e.*, whether or not plaintiffs met the "case or controversy" requirement of Article III. Petitioners' reliance on these cases reflects their inability (or unwillingness) to distinguish between standing issues and the more fundamental concept of jurisdiction. The Seventh Circuit here had no such difficulty:



> Standing means injury in fact, and a reduction in the market price of one's stock is injury. Parties are a subset of injured persons. Equating injury with party status is exactly the approach disapproved by *Marino*.

(Petition at 7a) In other words, even if a court found that Petitioners have standing because of alleged injury, that status is of no avail unless the court has "adjudicatory power" over Petitioners by reason of their more particular status as parties in the case. As the Seventh Circuit put it: "If the shareholders had appealed to the House of Lords, that tribunal would have dismissed the appeal out of hand. An appeal by nonparties is no different in effect." (Petition at 10a)

In another shot far wide of the mark, Petitioners assert that the Seventh Circuit's opinion can in no event "be squared with" *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), where this Court held the Bankruptcy Act of 1978 unconstitutional

because it violated Article III's provision that the judicial power of the United States must be vested in courts whose judges enjoy Article III protections and safeguards. The Court made its decision prospective only to avoid inequitable results. (Petition at 28) *Northern Pipeline*, however, was far different in character from a case like *Firestone*, where this Court considered whether a court of appeals—whose constitutionality was unquestioned—could apply a new jurisdictional rule only prospectively. As this Court stated in declining to apply *Northern Pipeline* retroactively, "It is plain that Congress' broad grant of judicial power to non-Article III bankruptcy judges presents an unprecedented question of interpretation of Article III." 458 U.S. at 64.

It is equally plain from this Court's rulings both before and after *Northern Pipeline* that purely jurisdictional decisions must be applied retroactively. Petitioners particularly challenge one of these decisions, *Budinich v. Becton Dickinson & Co.*, *supra*. (Petition at 29-30) There, this Court followed *Firestone* in holding that a jurisdictional ruling may never be made prospective only:

> Since the Court of Appeals properly held petitioner's notice of appeal from the decision on the merits to be untimely, and since the taking of an appeal within the prescribed time is mandatory and jurisdictional, . . . the Court of Appeals was without jurisdiction to review the decision on the merits.

486 U.S. at 202. Petitioners argue first that *Budinich* reflected an exercise of the court's statutory authority under 28 U.S.C. § 1291 as opposed to its "prudential" authority. (Petition at 29) As explained earlier in this



section of the brief, Petitioners' reliance on "prudential authority" is misplaced because it may come into play only when standing is the issue. Next, Petitioners claim that "because *Budinich* announced no new rule of law, it was not eligible for purely prospective application." (Petition at 29) That statement flies directly in the face of this Court's holding, which stated that a jurisdictional ruling may never be made prospective only, "*[r]egardless of whether today's decision works a change.*" 486 U.S. at 202 (emphasis added). Finally, Petitioners attempt to distinguish the "inequitable results" in *Budinich* from those it claims would "flow from retroactive application" here. (Petition at 30) The readiest answer to that argument lies in *Christianson v. Colt Indus. Operating Corp.*, *supra*, upon which the Seventh Circuit relied but which Petitioners do not seek to distinguish or even address. There this Court again followed *Firestone* and laid to rest whatever doubts may have remained about the place of inequitable results—whatever their character—in determining to apply a jurisdictional ruling retroactively:

> The age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists has always worked injustice in particular cases.

486 U.S. at 818. The Seventh Circuit thus correctly followed a strong line of decisions by this Court which hold that, regardless of any other consideration, jurisdictional rulings by their very nature must be retroactively applied. There is no reason for this Court to grant *certiorari* to alter the decision below.

## CONCLUSION

For the foregoing reasons, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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